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No. 98-552

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In The

# Supreme Court of the United States

October Term, 1998

DAVID M. ARMSTRONG, *et al.*,

*Petitioners,*

*vs.*

MARTIN MARIETTA CORPORATION, *et al.*,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

KAY L. WOLF
*Counsel of Record*
ALFRED TRUESDELL
GARWOOD, McKENNA,
McKENNA & WOLF, P.A.
*Attorneys for Respondents*
815 North Garland Avenue
Post Office Box 60
Orlando, Florida 32802-0060
(407) 841-9496

149293

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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## QUESTION PRESENTED

Whether the en banc appellate court correctly applied 29 U.S.C. §§ 626(d) and (e) in holding the statute of limitations begins to run again for a putative plaintiff dismissed from a 28 U.S.C. § 216(b) Age Discrimination in Employment Act ("ADEA") class or representative action, immediately upon the district court's entry of the interlocutory order denying class certification.

## LIST OF INTERESTED PARTIES

The Respondents in this action are Martin Marietta Corporation and Martin Marietta Technologies, Inc., which merged and reorganized subsequent to this action and are now known as Lockheed Martin Corporation.

In addition, pursuant to Supreme Court Rule 29.6, the following are nonwholly owned subsidiaries of Lockheed Martin Corporation:

2142040 CANADA
AEROPLEX OF CENTRAL EUROPE, LTD.
AESYS, LLC
AGI CHINA (M) LIMITED
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AIRPORT GROUP CANADA, INC.
AIRPORT GROUP INTERNATIONAL (BVI) LIMITED
AIRPORT GROUP INTERNATIONAL AIRLINE SERVICES PTY LTD
AIRPORT GROUP INTERNATIONAL GMBH
AIRPORT GROUP INTERNATIONAL HOLDINGS, LLC
AIRPORT GROUP INTERNATIONAL LDC
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AIRPORT GROUP INTERNATIONAL, INC.
AIRPORT GROUP NEW ZEALAND LIMITED
AIRPORT GROUP PACIFIC DEVELOPMENT (L) LIMITED
AIRPORT GROUP UNITED KINGDOM LIMITED
AIRSTRALIA DEVELOPMENT GROUP PTY LTD.
ALLIANCE EMIRATES DEVELOPMENT COMPANY, LLC
ARNOLD W. THOMPSON CORPORATION
BEIJING HUAYUN METEOROLOGICAL RADAR SYSTEMS CO. LTD.

CALCOMP A.B.
TUREBERGSVAGEN 11A
CALCOMP A/S
CALCOMP ASIA/PACIFIC LTD.
CALCOMP AUSTRALIA PTY LTD.
CALCOMP B.V.
CALCOMP CANADA, INC.
CALCOMP DISPLAY PRODUCTS, N.V.
CALCOMP ESPANA S.A.
CALCOMP EUROPE B.V.
CALCOMP EUROPE LTD.
CALCOMP GES.M.B.H.
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CALCOMP GRAPHICS PERIPHERALS (CHINA) LTD.
CALCOMP, INC.
CALCOMP INTERNATIONAL, INC.
CALCOMP LIMITED
CALCOMP PACIFIC, INC.
CALCOMP S.A.
CALCOMP S.P.A.
CALCOMP TECHNOLOGY EUROPE, N.V.
CALCOMP TECHNOLOGY, INC.
COALITION UNDERTAKING REMEDIAL EFFORTS, INC.
DANISH AEROTECH A/S
EARTH OBSERVATION SATELLITE COMPANY
ELECTRO-OPTICAS SUPERIOR SA DE CV
EO SYSTEMS INTERNATIONAL, LTD.
ERAAM CONSULTANTS SARL
ERAAM SARL
EURO-ART RADAR TECHNOLOGY GMBH
GLENDALE RESPONDENTS GROUP, LLC
GUAM AIR TERMINAL CORPORATION
GUANGZHOU AIRCRAFT MAINTENANCE ENGINEERING CO. LTD.

GULF DIAGNOSTIC CENTRE
GULF TECHNOLOGY SYSTEMS GROUP
HELLENIC BUSINESS DEVELOPMENT/
INVESTMENT CO., SA
HELLFIRE SYSTEMS, LLC
ILS INTERNATIONAL LAUNCH SERVICES, INC.
KAISER VENTURES, INC.
KONGSBERG/LOCKHEED MARTIN SPACE DATA
SERVICES AS
L3 COMMUNICATIONS HOLDINGS, INC.
LAH LIMITED
LETLOCK-SAUDI ARABIA
LOCKHEED AIRCRAFT INTERNATIONAL LIMITED
LOCKHEED AIRCRAFT SERVICE-OVERSEAS
LOCKHEED INTERNATIONAL LIMITED TAIWAN
LOCKHEED INVESTMENT HOLDING CO., A.S.
LOCKHEED KHRUNICHEV ENERGIA
INTERNATIONAL, INC.
LOCKHEED MARTIN AUSTRALIA PTY LIMITED
LOCKHEED MARTIN CANADA, INC.
LOCKHEED MARTIN CHEMICAL
DEMILITARIZATION SYSTEMS, LLC
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INC.
LOCKHEED MARTIN GMBH
LOCKHEED MARTIN IMS (UK) LIMITED
LOCKHEED MARTIN INTERNATIONAL LIMITED
LOCKHEED MARTIN INTERNATIONAL, SA
LOCKHEED MARTIN INTERSPUTNIK, LTD
LOCKHEED MARTIN SECURITIES, INC.
LOCKHEED MARTIN YATIRIM HOLDING, A.S.
LOCKHEED MIDDLE EAST SERVICES
LONGBOW LLC
LORAL MIDDLE EAST COMMUNICATIONS, LTD.
LORAL SPACE & COMMUNICATIONS LTD

MARTIN MARIETTA AUSTRALIA PTY LTD
MARTIN MARIETTA EO ASSOCIATES (EUROPE), INC.
MATHTECH HOLDING CORPORATION
MEADS INTERNATIONAL, INC.
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MLRS INTERNATIONAL CORPORATION
MOUNTAINGATE DATA SYSTEMS, INC (CA)
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NEW MEXICO TECHNOLOGY GROUP, LLC
NS CALCOMP CORPORATION
NV CALCOMP, SA
OPTIMUS LOCKHEED MARTIN INFORMATION TECHNOLOGY GROUP (OLMITG)
PACIFIC AEROSPACE CORPORATION LIMITED
PDES, INC.
PGM SYSTEMS, LIMITED
PGSUS, LLC
RADARSAT INTERNATIONAL, INC.
RATIONAL SOFTWARE CORPORATION
REAL 3D, INC.
RLM HOLDINGS PTY LTD
RLM MANAGEMENT PTY LTD
RLM SYSTEMS PTY LTD
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SERVICIOS TECNICOS LOCKHEED MARTIN DE MEXICO, SA DE CV

SIKA INTRNATIONAL LIMITED
SKY SOLUTIONS (UK) ltd.
SOFTWARE PRODUCTIVITY CONSORTIUM, INC.
SPACE IMAGING L.P.
SPACE IMAGING, INC.
TEAM APACHE SYSTEMS, LLC
TI/MARTIN JAVELIN JOINT VENTURE
TOSHIBA ELECTRONIC SYSTEMS CO., LTD
TRISTAR PARTS, LTD
TUSAS AEROSPACE INDUSTRIES, INC.
UNITED SPACE ALLIANCE, LLC
VALLEY ASSOCIATION CORPORATION
VENTURESTAR, LLC
WESTERN AUSTRALIA AIRPORT DEVELOPMENT (L) LIMITED
WESTERN INVESTOR TECHNOLOGY GROUP, LP
WESTRALIA AIRPORTS CORPORATION PTY LTD
WITG, INC.

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## OPINIONS BELOW

Respondents adopt the summary of the opinions below contained in the Petition for Writ of Certiorari.

## STATEMENT OF JURISDICTION

Respondents adopt the statement of jurisdiction contained in the Petition for Writ of Certiorari.

## STATUTORY PROVISIONS AND RULES INVOLVED

29 U.S.C. § 626(e) of the Age Discrimination in Employment Act:

> **(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice**
>
> Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in § 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

29 U.S.C. § 626(d) of the Age Discrimination in Employment Act

> **(d) Filing of charge with secretary; timeliness; conciliation, conference, and persuasion.**

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed . . .

(2) in a case to which § 14(b) [29 U.S.C. § 633(b)] applies; within 300 days after the alleged unlawful practice occurred . . .

28 U.S.C. § 1292(b):

**§ 1292. Interlocutory decisions.**

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Federal Rule of Civil Procedure 59(e):

**(e) Motion to Alter or Amend Judgment.** Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Federal Rule of Civil Procedure 54(b):

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

## STATEMENT OF THE CASE

### A. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, Respondents bring to the Court's attention the following misstatements of facts contained in the Petition.

Petitioners misrepresent to this Court that there are still thirty-three Petitioners in this appeal. (Petition, List of Parties, at ii). Named Petitioners Myrtle Y. Redding and Marlon K. Tarter were dismissed from this appeal by joint stipulation of the parties while it was pending before the Eleventh Circuit, reducing the number of appellants covered by the Eleventh Circuit's en banc opinion to thirty-one. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1378 (11th Cir. 1998).

Moreover, the Eleventh Circuit's en banc opinion affirmed the district court's granting of summary judgment only as to twenty-seven of the appellants. The en banc court reversed the decision of the district court as to four appellants — David M. Armstrong, Dominick C. Cizek, Kenneth A. Richards, and Edward W. Walsh — on the grounds of equitable tolling, because the Equal Employment Opportunities Commission (EEOC) misinformed them about the applicable statute of limitations. *Armstrong, Id.* at 1394. Therefore, named Petitioners Armstrong, Cizek, Richards and Walsh, whose individual claims were remanded by the Eleventh Circuit, en banc, and are pending before the Middle District of Florida, Case Nos. 98-752-CIV-ORL-18B, 98-753-CIV-ORL-18B, 98-754-CIV-ORL-18C, and 98-755-Civ-ORL-18C, respectively, should never have been named as Petitioners in this action.

Petitioners thus parties to this action are: L. Benson Barger, Wallace D. Black, Howard Brooks, Jerry A. Budd, Sonja M. Carter, Carol D. Clark-Iley, Charles H. Davis, Kenneth O. Giessuebel, Herold P. Glaser, Robert A. Havlish, Kumar Hinduja, Joseph C. Jett, Glenn E. Johnson, Robert C. Lerche, Calvin M. Lightner, George W. McGuirk, James W. McLean, William G. Murphy, Donald L. Prasky, Clark C. Rains, Russell G. Roberts, Linda L. Ryan, Victor W. Shaw, Linton W. Smith, Michael Sylvestri, Delbert S. Turner, and Joseph W. Williamson.

**B. Course of Proceedings and Disposition of the Case Below**

Four of the subject Petitioners[1], Charles H. Davis, Robert A. Havlish, Kumar Hinduja, and Linton W. Smith, were among

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1. In their Petition for Writ of Certiorari, Petitioners misrepresent the status of these four plaintiffs in the *Carmichael* representative action, lumping them together with the twenty-four Petitioners who opted into that action. (Petition, at 4).

twenty-three original named plaintiffs in a representative action filed in the United States District Court, Middle District of Florida, pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623-634. *Carmichael v. Martin Martietta Corp.*, Appeal Case No. 96-2706 (*Carmichael* R1-1). The remaining twenty-three subject Petitioners opted into the lawsuit pursuant to 29 U.S.C. § 626(b), incorporating by reference 29 U.S.C. § 216(b) of the Fair Labor Standards Act.

On April 7, 1994, the district court certified a *Carmichael* class of similarly situated individuals. Individuals who were not similarly situated, including Petitioners, were dismissed without prejudice from the representative action. At that point, they had a range of options, including appealing their dismissal from *Carmichael* or filing individual actions. Rather than requesting the court to reconsider the *Carmichael* certification order, to certify it for interlocutory appeal, or to enter a final judgment at that time for purposes of appeal, Petitioners elected to file the underlying joinder action of their individual claims. *Armstrong v. Martin Marietta Corp.* (R1-1). The *Armstrong* joinder action, filed in the Middle District of Florida on October 11, 1994, was comprised of forty-six individual claims. It contained the same age discrimination allegations, and was based on the same alleged facts, as those made in the *Carmichael* representative action. (*Carmichael* R1-1; R1-1).

On April 5, 1995, the district court granted partial summary judgment[2] against those claimants who had been dismissed from the *Carmichael* representative action (including the twenty-seven subject Petitioners), endorsing a March 22, 1995

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2. Thirteen *Armstrong* plaintiffs had not been part of the *Carmichael* class action and were thus unaffected by the Court's partial summary judgment order. Therefore, on May 10, 1998, the Court severed the remaining thirteen cases, which were since litigated as individual lawsuits and resolved.

recommended order by the United States Magistrate, holding that the claimants had failed to file their individual claims within the 90-day notice period required by 29 U.S.C. § 626(e). (R2-24-2,7,8; Petitioners' Appendix, A-1).

Petitioners moved for entry of final judgment under Federal Rule of Civil Procedure 54(b) as to the dismissed plaintiffs, and the *Armstrong* court entered judgment on September 14, 1995. (R2-29, 30). Petitioners' notice of appeal of their dismissals was filed on September 25, 1995. (R2-31).

The Eleventh Circuit Court of Appeals reversed on September 11, 1996. *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 (11th Cir. 1996), *vacated en banc,* 138 F.3d 1374. The panel agreed that the 90-day statute of limitations in discrimination cases is tolled while putative plaintiffs are members of a class, but held that when tolling ceased depended upon what course of action a putative plaintiff took following his dismissal from the class. The panel held that, if the dismissed putative class member did not pursue an interlocutory appeal or appeal the final judgment, tolling ceased upon entry of the dismissal order, and an individual action had to be filed within 90 days of the order dismissing him from the class. However, if a timely interlocutory appeal of the dismissal order was filed, tolling did not cease until the interlocutory appeal was denied; and if the final judgment of the class determination was timely appealed, tolling did not cease until the appeal was denied. *Id.* at 1509. Because Petitioners did not file an interlocutory appeal and filed their individual claims before final judgment was entered but after the expiration of the 90-day limitations period from the date of the *Carmichael* dismissal order, the panel determined they filed their individual actions in *Armstrong* untimely. However, the panel decided not to apply its ruling retroactively, and reversed summary judgment against Petitioners. *Id.* at 1510. A strong dissent preferred a bright line

rule that the statute of limitations resumes running once the claimant is dismissed from the class. *Id.* at 1513.

Respondents subsequently filed a Suggestion of Hearing En Banc, and the Eleventh Circuit granted en banc review.

The Eleventh Circuit, sitting en banc, reversed and vacated the panel decision, affirming the district court's order granting summary judgment for the twenty-seven subject Petitioners. *Armstrong, supra,* at 1394 (11th Cir. 1998). The en banc court followed Supreme Court precedent and held the tolling of the statute of limitations ceased once Petitioners were dismissed from the class. *Id.* at 1391. The court opined that once they were no longer members of the class Petitioners could no longer rely on the class to protect their interests. *Id.* at 1384.

Thus, the twenty-four Petitioners who failed to file their individual lawsuits within 90 days of the class certification order were barred by the 90-day limitations period. In addition, three Petitioners[3], Carol D. Clark-Iley, Glenn E. Johnson, and Victor W. Shaw, had not filed individual EEOC charges before piggybacking onto the *Carmichael* timely-filed EEOC "class" charge, and they failed to file their EEOC claims within the time period remaining on their 300-day administrative charge-filing period after the class certification decision. Thus the en banc court affirmed summary judgment as to Clark-Iley, Johnson and Shaw, because their claims were barred by the administrative statute of limitations and by the requirement that a prospective plaintiff file a timely charge of discrimination with the EEOC prior to suit in federal court. *Armstrong, supra,* at 1394.

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3. In their Petition for Writ of Certiorari, Petitioners misrepresent the basis for the affirmance of summary judgment as to these three Petitioners, lumping them together with the twenty-four Petitioners who failed to file their lawsuits within 90 days of the class certification decision. (Petition, at 8).

In so doing, the en banc court pointed out that allowing Petitioners to wait to bring their individual claims until the *Carmichael* class had fully litigated its claim and exhausted its appeal would contravene important policy considerations behind statutes of limitations. *Id.* at 1380, 1388-1389.

## REASONS FOR DENYING THE WRIT

### I.

### THE EN BANC DECISION APPLIES SUPREME COURT PRECEDENT IN AFFIRMING SUMMARY JUDGMENT AGAINST PETITIONERS.

This Court should deny the Petition for Writ of Certiorari because, in affirming the district court ruling granting summary judgment against the twenty-seven subject Petitioners, the Eleventh Circuit followed the statute of limitations tolling rule for class actions articulated by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and then in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Therefore, the court below cannot be said to have

> so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Supreme Court Rule 10(a).

*American Pipe* held the filing of a class action tolled the statute of limitations only until the court denied class certification. *American Pipe*, 414 U.S. at 561. *American Pipe* involved a class action antitrust complaint filed with just eleven days remaining before the limitations period expired. Several

months later, the district court denied class certification. *Id.* at 541-543. Eight days after the order denying class certification was entered, several state and local agencies that had been putative class members moved to intervene in the action and become plaintiffs. *Id.* at 543-544. This Court, in allowing them to intervene, held

> . . . that commencement of the class action in this case suspended the running of the limitations period *only during the pendency of the motion to strip the suit of its class action character.* The class suit . . . was filed with eleven days yet to run in the [limitations] period . . . and the intervenors thus had eleven days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of [the] order, it follows that the motions were timely.

*Id.* at 561 (emphasis added).

The rule established in *American Pipe* was extended in *Crown, Cork,* a race discrimination class action, to former putative class members filing individual lawsuits. In *Crown, Cork*, the plaintiff filed a timely EEOC charge alleging race discrimination (as did all but three Petitioners in this case), and then became a member of the class action while the charge was pending. Subsequently, the plaintiff received a right-to-sue notice from the EEOC. After he received his notice, the federal court denied class certification. The plaintiff then filed an individual Title VII lawsuit. This Court held that since the plaintiff had not received his right-to-sue notice until after the class action was filed, he retained the full 90 days in which to bring his individual suit after class certification was denied.

This Court concluded that the commencement of a class action suspends or tolls the limitations period for all asserted members of the class "until class certification is denied." *Crown, Cork, supra,* at 354. At that point, class members have the option of filing individual suits or intervening as plaintiffs as long as "those actions are instituted within the time that remains on the limitations period." *Id.* at 347.

Petitioners attempt to distinguish Supreme Court precedent by arguing that *Crown, Cork* and *American Pipe* involve Rule 23 class actions, not a representative action brought pursuant to the ADEA. Even though these Supreme Court cases involve Rule 23 rather than § 216(b) classes, the key principle remains the same: tolling of the statute of limitations ends with the order determining class or representative status and/or participation, not with a later final judgment or still later appeal. This principle applies regardless of the type of class involved or whether class certification was granted or denied. This Court never has held that the statute of limitations remains tolled for individuals dismissed from the class until a final judgment is entered for the remaining class members or the class exhausts its appeals.

The en banc court had additional authority for its tolling rule from *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994), which held that although the 300-day period for filing charges with the EEOC was tolled as long as the plaintiffs were members of a class, it began running once the certification order was vacated, since the individuals could then no longer rely on the class to protect their rights. *Id.* at 360.

Other circuits, as pointed out in the en banc decision below, have also rejected the contention that tolling extends beyond the denial of class certification, through final judgment and the exhaustion of all appeals. The Third Circuit in *Nelson v. County of Allegheny*, 60 F.3d 1010 (3d Cir. 1995), held that

tolling ends when class certification is denied. The court concluded that

> to permit tolling of the statute of limitations until final resolution on appeal of all claims would disable the essential purpose of the statute and encourage plaintiffs to sleep on their rights.

*Id.* at 1013.

The en banc court in the instant case recognized the essential policies behind statutes of limitations and their importance to the fairness and efficiency of the judicial system. The court held that "continuing to toll the statute of limitations through trial and through the entire appeals process would seriously contravene the policies underlying statutes of limitations." *Armstrong, supra,* at 1388. Statutes of limitations are intended to prevent " 'the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' " *Id.* citing Order of *R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-349. The court recognized that the rule proposed by Petitioners "would leave cases in limbo for years at a time" and would prejudice defendants. *Id.* at 1388. Age discrimination cases are especially susceptible to this problem since many witnesses or parties are at or near retirement age when the litigation commences. *Id.* at n.31.

Given, as the en banc court noted below, that *Crown, Cork* held or impl[ied] strongly, "that tolling of the statute of limitations ends upon the district court's denial of class certification," the en banc decision cannot possibly be held to have departed from the accepted and usual course of judicial proceedings sufficiently enough to call for review by this Court. *Id.* at 1382.

## II.

## THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS ON THIS ISSUE.

The Petition for Certiorari should likewise be denied because the Eleventh Circuit's en banc decision is "not in conflict with another United States Court of Appeals on the same important matter." Supreme Court Rule 10(a). Any perceived conflict among the circuits was resolved years ago by this Court, first in *American Pipe*, and then in *Crown, Cork*. The legal principle that tolling of a statute of limitations ceases once claimants are dismissed from a class is so clearly established the en banc court referred to it as "the *Crown, Cork* rule." *Id.* at 1382 n.14.

All federal appeals courts that have ruled on this issue since *Crown, Cork* have followed or affirmed this rule. *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998); *Nelson v. County of Allegheny, supra*; *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir. 1989); *Andrews v. Orr*, 851 F.2d 146, 149-150 (6th Cir. 1988). The First Circuit ruled that way before *Crown, Cork* in *Fernandez v. Chardon*, 681 F.2d 42, 48 (1st Cir. 1982).

The so-called conflict cited by Petitioners arises from *Jimenez v. Weinberger*, 523 F.2d 698 (7th Cir. 1975). However, this opinion was issued eight years before *Crown, Cork*, and, insofar as it conflicts, can no longer be considered a valid statement of federal law.

In addition to lacking controlling authority, *Jimenez* is factually distinguishable from the instant case. *Jimenez* involved a constitutional challenge to the Social Security Act's proviso making illegitimate children born after disability of their parents

ineligible for benefits. The complaint sought both individual and class relief. A three-judge court sustained constitutionality of the statute without considering the class action issue, and the Supreme Court reversed on the merits without making any reference to it. The district court, on remand, granted classwide relief to 7,000 unnamed claimants. The issue before the Seventh Circuit on appeal was whether the timely filing of the suit by the named plaintiffs satisfied the 60-day statute of limitations requirement for the entire class. The Seventh Circuit held that, because no court had previously ruled on the class action issue, "... the class claims [over which the court had acquired jurisdiction when the complaint was filed] continued to pend and the statute of limitations did not run." *Id.* at 696.

*Jimenez* thus does not support Petitioner's assertion that the statute of limitations tolls on behalf of the dismissed putative plaintiffs until the remaining class claim is fully litigated and all its appeals exhausted. Although the Seventh Circuit speculated in dicta that the statute of limitations might continue to toll after an adverse class determination if the plaintiffs appealed the issue, the court fell far short of adopting that reasoning as the basis for its decision; ruling instead, as previously discussed, that no tolling issue arose because no adverse class determination was ever made. Therefore, *Jimenez* does not present a conflict among circuits on the tolling issue and does not warrant this Court's granting of Petitioners' request for certiorari in this case.

The other case cited by Petitioners, *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (Utah 1992), was recited by the en banc court only to point out that the Utah court "misread federal law." Because *American Tierra* is not a federal circuit court and because, as the en banc court below noted, it offered no rationale for its holding (which it based on *Jimenez* without discussing those circuit court cases decided after

*Crown, Cork*, e.g., *Calderon*, *Andrews*, or *Fernandez*), it provides no authority in support of Petitioners' Petition for Certiorari and is not worth further analysis.

## III.

## RULE 54(b) DOES NOT INDEFINITELY TOLL STATUTE OF LIMITATIONS FOR NON-CLASS MEMBERS.

The question framed by the en banc court in this case was

> whether, in the absence of controlling authority, the statute of limitations begins to run again immediately upon the district court's entry of the interlocutory order denying class certification, or *whether the statute remains tolled through final judgment in the former class action and completion of an appeal from the order denying class certification.*

*Armstrong, supra,* at 1378 (emphasis added). Petitioners' allegation on p. 10 of their Petition that "the en banc court refus[ed] to address petitioners' [Rule 54(b)] argument" is thus absurd. The en banc court thoroughly considered Petitioners' argument, and concluded that the interpretation of Rule 54(b) Petitioners seek is patently unreasonable and seriously contravenes the policies underlying statutes of limitations.

The en banc court pointed out that "the purpose of [such] tolling is to encourage class members to reasonably rely on the class action to protect their rights." *Id.* at 1380. Once dismissed, claimants are no longer members of the class, and can no longer be considered parties protected by the tolling rules. Their interests are no longer the same as those of the class. It is not

reasonable for dismissed putative class members to rely on the protections of a class to which they do not belong. Once removed from the class, it is reasonable to expect them to act on their rights.

The en banc court specifically addressed Petitioners' argument that the statute of limitations should continue to be tolled because the interlocutory order denying certification (or, in this instance dismissing them from the certified class) might be later reversed by the district court or by the court of appeals upon interlocutory review or after final judgment. Although the en banc court agreed that the certification decision could be reviewed in any of these ways, and, in addition, through the possibility of mandamus review (". . . in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion," circumstances which the court stated were not presented in this case), because the standards of review/reversal are so difficult to meet, the court said "no reasonable person would rely on the hope that either the district court or this court might someday determine that the suit should have proceeded as a class action." *Armstrong, Id.* at 1381, 1385-1386.

Petitioners attempt to disparage the en banc court's logical analysis by labeling it "The Three Percent Rule." While the phrase may ring like a tabloid headline, it does nothing more than attempt to refute sound legal analysis with the equivalent of a TV news sound bite. The en banc court in fact adopted no such rule or standard; it merely pointed out that the chances of a trial court reversing a decision on class certification are extremely slim. The court cited empirical studies showing reconsideration of class certification decisions were granted in less than three percent of all cases. *Id.* at 1381, n.12. This is hardly a judicial standard; rather, it is a fact which gives support to a conclusion. Moreover, Petitioners' argument rings

particularly hollow, given their failure to request that the district court reconsider its class certification order.

In fact, Petitioners failed to exercise any of the options available to them for review of the district court's certification order in *Carmichael* prior to filing their individual suit(s) in *Armstrong*, i.e., they failed to file a Motion for Reconsideration or Relief pursuant to Fed. R. Civ. P. 59(e); they failed to file an interlocutory appeal pursuant to 29 U.S.C. § 1292(b)[4] and they failed to move the court under Rule 54(b) to enter a final judgment and to certify there was no just cause to delay their appeal. Instead, they abandoned their *Carmichael* class claim and filed their individual actions in *Armstrong* involving literally the same claims, containing the same facts and the same legal issues — at the same time. These multiple actions are exactly what the tolling rule was designed to avoid. In addition, if the time period for filing individual actions did not begin to run until the entry of a 54(b) final judgment, or until the *Carmichael* appeal is exhausted, as Petitioners argue, then Petitioners' individual claims in this case were filed prematurely. Petitioners cannot argue the *Carmichael* certification order was final for purposes of filing their individual actions in *Armstrong*, but was not final for purposes of the statute of limitations.

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4. The appeal of class certification orders will become a quicker and easier process if Congress approves changes in Rule 23. A proposed section (f), already approved by this Court, authorizes appeals of class certification orders, which now are interlocutory, if made within ten days. Although the Rule 23 change would not automatically apply to § 216(b) representative actions, courts look to Rule 23 caselaw in deciding issues regarding § 216(b) cases. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995). Thus the proposed Rule 23(f) would be given "great weight" in determining whether an interlocutory appeal of a § 216(b) class determination was authorized.

The court further concluded Petitioners' misinterpretation of Rule 54(b) was unreasonable because to allow the statute of limitations to toll through trial and all appeals would seriously undermine the policies on which statutes of limitations are based. In ADEA representative action cases, it would extend for a dismissed putative class member the 90-day deadline for filing suit (or the 300-day deadline for filing an administrative charge) for an undefined period — generally several years. It would be unfair to parties and poor public policy to give a former putative class member years after his dismissal from a representative action to file a lawsuit (or administrative charge), while allowing an individual plaintiff who never opted into a representative action only 90 days to file suit (or 300 days to file his administrative charge).

Referencing this Court's analysis in *American Pipe*, the en banc court noted that to allow a dismissed putative class member to wait until final judgment on the merits of a class action before determining whether participation in the class (rather than pursuing his individual action) was in his best interest would allow him to unjustly "... benefit from a favorable judgment without subjecting [himself] to the binding effect of an unfavorable one." *Armstrong, supra,* at 1389, citing *American Pipe, supra,* at 547.

Further, as the en banc court noted, it would encourage plaintiffs' attorneys to load classes with large numbers of individuals, regardless of how dissimilar and how improper their membership, to shield them from statutes of limitations for long periods of time. It would likewise force defendants to forego meritorious defenses to class certification and instead litigate all putative class claims in the class case (just to avoid the uncertainty of not knowing when their exposure to claims of putative class members would end). The result would be an

> unnecessary — and perhaps an intolerable — tax on the judiciary, as courts are forced to preside over large class actions as to which a meritorious defense exists but has not been profferred.

*Armstrong, supra,* at 1389. For these reasons, the en banc court concluded that the federal interest in encouraging reliance on the class mechanism *after* denial of certification is "virtually non-existent." *Id.* at 1385.

Finally, there are no class or representative action cases which support Petitioners' mistaken assertion that, because a dismissed putative class member may wait until a final judgment is entered to appeal his dismissal from a representative action, Rule 54(b) also requires tolling of his individual statute of limitations during that entire time. All of the cases cited by Petitioners involve individual actions filed after dismissal from a class action.

The issue in *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979), was whether the plaintiff in an antitrust suit could appeal the dismissal of one of several defendants. The court held the order was not final for appeal purposes until summary judgment and a final judgment was entered on behalf of the other defendants. *Id.* at 1370 n.2. *Ansam Associates, Inc., v. Cola Petroleum, Ltd.*, 760 F.2d 442, 445-446 (2d Cir. 1985), involved the issue of whether dismissed claims could be considered on appeal and whether the order was a 54(b) final judgment. The third case cited by Petitioners, *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 31 (D.C. Cir. 1990), involved the issue of whether an appeal of a 54(b) final judgment could include a prior ruling of one of several defendants. The opinion discussed whether a final judgment must be on a document separate from the court opinion or order. *Id.* at 32.

Therefore, as the en banc court correctly concluded, Rule 54(b) does not extend tolling of the statute of limitations for dismissed putative class members through final judgment in the class action and completion of all appeals therefrom.

## IV.

## A SECTION 216(b) REPRESENTATIVE ACTION IS A CLASS ACTION.

Petitioners mistakenly argue the jurisprudence of the tolling of the statute of limitations in class actions established by this Court is not applicable because Petitioners' ADEA representative action brought in *Carmichael* was not a Fed. R. Civ. P. 23 class action. They thus argue the precedent established by this Court for putative plaintiffs in class actions should not be applied to this case. The argument ignores the fact that a representative action is a type of class action, even though it has certain characteristics which distinguish it from a Rule 23 class action. Courts typically look to Rule 23 class actions to provide guidance in analyzing representative actions. *Mooney*, *supra,* at 1212.

A representative action under § 216(b) is neither a pure Rule 23 class action nor a Rule 20 joinder action. Rather, it is a hybrid with its own unique characteristics. It shares some traits of both while maintaining a separate and distinct identity. The primary distinction is that claimants are required to affirmatively opt into a § 216(b) representative action, and are not included in the class unless they do so. In Rule 23 actions, the court certifies a class and notice is given to members, who remain in the class unless they opt out. These distinctions were recognized by the Eleventh Circuit as well as by the district court below.

A representative action possesses the class traits of allowing claims to proceed on behalf of others similarly-situated and of allowing class members to "piggyback" on the class administrative charge(s) filed by class member(s). In so doing, claimants face the risk that the class may not be certified, or if it is certified, that they will be excluded for failing to meet the similarly-situated requirement and be subject again to the statute of limitations.

Petitioners mischaracterize an ADEA representative action as nothing more than a joinder of individual claims or parties with no class characteristics. No authority in statutes or case law supports this description. ADEA class actions brought under § 216(b) have different characteristics than Rule 20 joinder actions. By definition, the two are "mutually exclusive." *Flavel v. Svedala Industries, Inc.*, 875 F. Supp. 550, 553 (E.D. Wis. 1994). The two different actions have different standards for plaintiffs. The more difficult joinder standard allows multiple claims to be joined if they arise out of the same transaction or occurrence and contain common questions of law or fact. *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996).

Petitioners are former putative plaintiffs in *Carmichael*, which was litigated for two years as an ADEA representative or "class" action. The original and amended complaints in *Carmichael* state the case was brought pursuant to § 216(b) as a representative action on behalf of a class of "similarly situated" individuals. (*Carmichael* R1-1; R2-83). Nowhere was it pled in *Carmichael* (as it was later in *Armstrong)* that plaintiffs were proceeding as a joinder action under authority of Rule 20. (*Carmichael* R1-1; R2-83; R1-1). The twenty-three subject Petitioners who opted into *Carmichael* followed the opt-in procedures of § 216(b). (*Carmichael* R1-3 to 6, R1-48 to 57, R2-58 to 64, R2-68 to 81; R2-84 to 167). Members of the class who did not timely file EEOC charges were able to

piggyback on the administrative compliance of other class members, a feature unique to class actions, and when they were dismissed from the *Carmichael* representative action, had to timely file their own individual administrative charges of discrimination. *Griffin v. Singletary, supra,* at 359-61 (11th Cir. 1964); *Armstrong, supra,* at 1392-1393. Prior to trial, *Carmichael* plaintiffs fought to maintain their class status by vigorously opposing Respondents' motion to decertify the class, arguing it was not a case to which the permissive joinder requirements of Fed. R. Civ. P. 20(a) applied. Now, after litigating *Carmichael* as a class in district court, Petitioners make the opposite argument, and claim this class action was really a joinder case all along.

The action brought in *Carmichael* under § 216(b) cannot be a joinder action merely because every individual was a named plaintiff who affirmatively opted into the case. Putative members opted into the case because it was mandated by § 216(b). Respondents agree an ADEA representative action is not the same as a Rule 23 class. Nonetheless, it is a class. It is simply a different kind of class, created specifically for age discrimination claims.

The courts below were well aware of the differences between § 216(b) and Rule 23 class actions. None of the courts below ever treated this case as a Rule 23 class. The en banc court cited *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975), which explains the fundamental differences between the two types of classes. None of the courts below ever mischaracterized the *Carmichael* class. Petitioners, however, mischaracterize it when they attempt to treat this § 216(b) class as a joinder action.

## CONCLUSION

Because the Eleventh Circuit, sitting en banc, did not so far depart "from the accepted or usual course of judicial proceedings, or sanction such a departure by a lower court" as to require the exercise of this Court's supervisory power, and because the decision does not conflict with another U.S. Circuit Court of Appeals on an important matter, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KAY L. WOLF
*Counsel of Record*
ALFRED TRUESDELL
GARWOOD, McKENNA,
McKENNA & WOLF, P.A.
*Attorneys for Respondents*
815 North Garland Avenue
Post Office Box 60
Orlando, Florida 32802-0060
(407) 841-9496